The ruling that an execution issued in violation of the stipulation of the parties, is, notwithstanding, sufficient to repel the bar of the statute, is important. Reasoning merely from principle, a different conclusion might be reached. No man should be permitted to reap a benefit from his own wrong. But the authorities are overwhelmingly in favor of the rule adopted by the court, that an execution issued contrary to the stipulation of the parties, is voidable only and not void, and hence is not subject to collateral attack. 1 Freeman, Executions, 26; *Cody* v. *Quinn*, 6 Ired. (N. C.) 193, 44 Am. Dec. 75; *Bacon* v. *Cropsey*, 7 N. Y. 195; *Beebe* v. *U. S.*, 161 U. S. 104; *Stewart* v. *Stocker*, 13 S. & R. (Pa.) 199.

HANCOCK V. WHITEHALL TOBACCO WAREHOUSE CO.

AND

HANCOCK V. HUBARD & ANDERSON, TRUSTEES, AND OTHERS.*

Supreme Court of Appeals : At Wytheville.

June 19, 1902.

1. COUNTY COURTS—*Jurisdiction—Rents—Forthcoming bonds—Set-offs.* Forfeited forthcoming bonds taken on distress warrants issued for rent by justices of the peace of a county are returnable to the county courts, and when motion is made for judgment in such courts, the tenant may make any defence which shows that the rent is not due in whole or in part. The tenant has the right to rely upon set-offs in said courts to the extent to which it is necessary to make complete defence to the landlord's demand, regardless of the amount of such set-off. There is no pecuniary limit to the jurisdiction of said courts in this respect. Code, sections 2787, 3004, 900, 3046.

2. CHANCERY PRACTICE—*Injunction—Adequate remedy at law—Landlord and tenant.* A court of equity in this State will not enjoin an insolvent landlord from issuing a distress warrant for rent merely because the tenant has large set-offs against the landlord's demands; nor will it enjoin a tenant from disputing his liability for the rent or the fullfilment by the landlord of his contract in a case not involving a rescission of the contract of lease. In each case the party has an adequate remedy at law.

Appeals from decrees of the Circuit Court of Buckingham county, pronounced December 6, 1901, and December 30, 1901, in a suit in chancery wherein the appellees, Hubard & Anderson, trustees, were the complainants, and the appellants and others were the defendants; and from a decree of said court, pronounced June 22, 1901, in a suit in chancery wherein the appellant was the com-

*Reported by M. P. Burks, State Reporter.

plainant, and the appellee, Whitehall Tobacco Warehouse Company, was the defendant; the two appeals being heard together.

Affirmed in part.

The opinion states the case.

Beasley & Moon, for the appellants.

R. T. Hubard and *E. W. Hubard,* for the appellees.

KEITH, P., delivered the opinion of the court.

A. J. Hancock, doing business under the style of the Lynchburg Tobacco Company, in May, 1901, filed a bill in the Circuit Court of Buckingham County, from which it appears that on the 17th of of March, 1898, the Whitehall Tobacco Warehouse Company agreed to erect for it and have ready for occupancy October 1, 1898, a tobacco factory at Whitehall, according to the specifications contained in the contract, to be constructed in a substantial manner, and "to be equipped with modern appliances for the proper steaming and handling of tobacco;" that the Lynchburg Tobacco Company was to pay a rental of $450 per annum, to commence October 1, 1898; that by an agreement of the same date, the Whitehall Tobacco Warehouse Co. leased to the Lynchburg Tobacco Co. a tobacco warehouse at Whitehall, in Buckingham county, with fixtures and appurtenances, at a rental of $225 per annum, with the privilege to the Lynchburg Tobacco Co. to extend the lease upon both the factory and the warehouse for three years from the first of October, 1900; that the lessee entered upon the leased premises, and a controversy having arisen between the lessor and the lessee, the latter brought an action of trespass on the case in the year 1900, alleging numerous items of damage which it had sustained by reason of the failure on the part of its lessor to comply with its contract of the 17th of March, 1898, especially charging that it had been greatly injured by the failure of the Whitehall Tobacco Warehouse Co. to equip the factory with modern appliances for the proper steaming and handling of tobacco. The aggregate amount of damages claimed in this suit by the plaintiff was $6,000. The jury which tried it on the 3d day of May, 1901, gave a verdict of $250, upon which the court rendered judgment.

The bill further charges that the Warehouse Company is insolvent; that it owns no property except the warehouse and factory, which it has encumbered by a deed of trust to secure bonds greater

in amount than the value of the property, and therefore the only remedy of the Lynchburg Tobacco Company is to set off its claim for damages against the demand for rent made against it; that the proceedings for the collection of the rent will be tried in the County Court, which has not jurisdiction of civil cases where more than $100 is involved; that it cannot, therefore, plead its set off in that court, and prays that a court of equity may enjoin the collection of the rent and compel the Warehouse Co. to allow the set-off claimed against it.

The bill concludes with the prayer that all proper accounts may be taken, including all accounts of the losses hereinbefore set forth, which complainant is entitled to recover from the defendant; and that the defendants may be enjoined and restrained from further proceedings, whether by distress warrants or attachment or otherwise, until the further order of the court.

The injunction was awarded in accordance with the prayer of the bill.

The Whitehall Tobacco Warehouse Company answered this bill, and filed a bill on its own account in the Circuit Court of Buckingham county on the 30th of May, 1901, in which it sets forth the agreement already referred to in the bill of the Lynchburg Tobacco Co. and details the wrongs it had suffered at the hands of the Lynchburg Tobacco Co. in refusing to pay its rent, for reasons which need not be recapitulated, but which, in the opinion of the lessor, were wholly unwarrantable and unconscionable, and equivalent to a repudiation by the Lynchburg Tobacco Co. of its contract, and causing irreparable damage to the plaintiff. The prayer of the bill is, that the Lynchburg Tobacco Co. may be enjoined "from further disputing the proper equipment of the factory and from the further refusal to pay the rents" which have accrued; or, as an alternative relief if that should be denied, "that the said contract upon which said false construction was put by said A. J. Hancock may be held and taken as broken by her, and may thereupon be as to your orator annulled and rescinded."

On the 9th day of December, 1901, James L. Anderson and E. W. Hubard, trustees, filed their bill in the Circuit Court of Buckingham County, in which they showed that they are trustees under a deed of trust of October 1, 1898, executed by the Whitehall Tobacco Warehouse Co. to secure the payment of certain bonds aggregating the sum of $4,000, interest payable semi-annually at

six per cent, the principal falling due ten years after date, but with the condition that if default be made upon any part of the interest on the bonds, the whole amount of principal and interest accrued should thereupon be due and payable.

The complainants state that default has been made in the payment of the interest upon all of the bonds; that the taxes are delinquent; that the insurance upon the property has nearly or quite expired, and that the bond holders have required the trustees to take control of the property in order to protect their interests; that no provision is made in the deed for the trustees operating or leasing the property conveyed to them; and that being without remedy they pray that the Whitehall Tobacco Warehouse Company may be made a party defendant; that all proper accounts may be directed, and that a receiver be appointed with authority to lease out the warehouse, so long as to the court it may seem proper, on terms that will secure payment of the accruing interest and keep the property insured, and if necessary that a sale may be made. A copy of the trust deed is filed as an exhibit with the bill.

The Tobacco Warehouse Company answers the bill, admits its allegations to be true, but suggests that great loss and damage would result from an immediate sale of the property; waives its right to require the trustees to sell upon the terms specified in the deed of trust, professes its willingness to accede to any other terms deemed best by the court, and unites in the prayer for the oppointment of a receiver as promotive of the interest of all concerned.

The suits of Hancock against the Whitehall Tobacco Warehouse Co. and of the Whitehall Tobacco Warehouse Co. against Hancock, came on to be heard together upon the bills, answers, exhibits and affidavits, and on the 22d day of June, 1901, a decree was entered dissolving the injunction awarded at the suit of the Lynchburg Tobacco Co., and overruling the motion to dissolve the injunction awarded upon the bill by the Whitehall Tobacco Warehouse Co. against the Lynchburg Tobacco Co.

We are of opinion that there is no error in so much of the decree as dissolves the injunction in the first named suit. The plaintiff in that bill had a complete remedy at law. When rent is in arrear the landlord may issue his distress warrant. If a tenant wishes to make defence he gives a forthcoming bond, which, when forfeited, the officer returns to the County Court. See sections 2787, 3004, and 900. When motion is made for judgment upon this bond, the

tenant may make any defence which shows that the rent is not due (sec. 3621 Code of Va.), and it was expressly decided in *Allen* v. *Hart,* 18 Gratt. 737, that set off is an admissible defence upon a motion in a forthcoming bond taken under a warrant of distress.

By the provisions of Chapter 160 of the Code, a defendant in a suit for any debt, or in any action on a contract, is given the most comprehensive right of set off. In whatever court the defendant may be impleaded, this right of set off exists to the extent to which it is necessary to make complete defence to the demand of the plaintiff, and there is nothing in the statute fixing the jurisdiction of the county court which limits or restricts this right.

Section 3046, after enumerating in part the subjects over which the county court is given jurisdiction, declares that "they shall also have jurisdiction of all causes, motions, and other matters and things made cognizable by law." As we have seen, the forthcoming bond is made cognizable in the county court, and becomes to all intents and purposes an action over which that court has complete jurisdiction, and in which all proper defences may be made; and, as already observed, set off is a proper defence to a motion for judgment upon a forthcoming bond given upon a warrant of distress for rent. A court of law, therefore, having ample jurisdiction over the controversy, it would not be proper for us to say more upon the subject. It will be for that court to determine the measure of relief to which the parties litigant are entitled, and it will be for that court to say how far the action at law heretofore brought, and in which the jury rendered a verdict of $250, constitutes a bar to any further recovery of damages for breach of the contract therein set forth.

Plaintiff alleges that the Whitehall Tobacco Warehouse Company is insolvent. That, perhaps, may be taken as true, but if the only property which it possesses is more than covered by the deed of trust resting upon it, and it has no other assets, all of which is averred and relied upon by the Lynchburg Tobacco Co. in its bill, then the only relief which is possible, under the circumstances, will be in the nature of a defence to its action for the recovery of rent, and that defence can be made as fully in a court of law as in a court of equity.

We come now to consider so much of the decree as refuses to dissolve the injunction awarded at the instance of the Whitehall Tobacco Warehouse Co. The case presented in the record is not

one for the rescission of the contract, and all other matters which it discloses can be litigated in the proceedings instituted by the Tobacco Warehouse Company for the recovery of the rent which it claims to be due. We are therefore of opinion that there is no error in so much of the decree as dissolves the injunction awarded upon the bill filed by A. J. Hancock, styling herself the Lynchburg Tobacco Company, and it must be affirmed; and that so much of the decree as overrules the motion to dissolve the injunction awarded at the prayer of the Whitehall Tobacco Warehouse Company is erroneous and should be reversed, and this court proceeding to enter such decree as the Circuit Court ought to have entered, it is ordered that both of said bills be dismissed at the costs of the respective plaintiffs.

In the case of *Hancock* v. *Anderson and Hubard, trustees,* while it is true that under the deed of trust there was no lien upon the rents and issues of the property conveyed until a court of equity took charge of it and appointed a receiver for their collection, yet no one was aggrieved by the direction to the receiver to collect the rents already accrued, except the Whitehall Tobacco Warehouse Company, and it is making no objection to the decree. The whole subject of the collection of rents is remitted by what has been said in the cases just disposed of to a court of law. In that court, the tenant may make every just defence, and cannot be considered as prejudiced if he is required to pay what is ascertained to be due to the assignee of his lessor.

We are of opinion that the decree in this case should be affirmed.

Affirmed in part.

NOTE.—This case seems to present no questions of novelty or of special difficulty. The main question in the case was whether, on a motion for judgment on a forthcoming bond taken under a distress warrant for rent, the tenant may set up damages for breach of the contract of lease. This question was authoritatively settled as to a liquidated sum as a set-off, in *Allen* v. *Hart,* 18 Gratt. 722, cited by the court. The opinion in that case, by Moncure, P., contains an extremely learned discussion of the practice in the action of replevin and in its statutory substitute of motion on a forthcoming bond. We commend the opinion to those who have the leisure and energy to read it. The opinion in *Carter* v. *Grant,* 32 Gratt. 769, *per* Burks, J., is also instructive as to proceedings on motion for judgment on a forthcoming bond taken under a distress warrant, the main point established in that case being that in such a proceeding the burden of proving the contract of rent is on the plaintiff. It was also held that though the distress warrant be sued out for more rent than is due, judgment may nevertheless be had for the amount justly due.

It is important to inquire whether the defense in the principal case were in the nature of *set-off* or of *recoupment*. It seems to have arisen out of a breach of the contract of lease, and should, therefore, be treated as "recoupment" and not as "set-off"—the latter term being applicable to claims arising out of transactions *dehors* the contract sued on. The court, however, designates it a "set-off". The difference may be material. There is probably no doubt that defendant may always cut down plaintiff's recovery on a forthcoming bond taken under a distress warrant by showing a breach of the contract of lease, even where the damages are unliquidated. This is the general rule in other actions on contract, and no reason is perceived why it should not be equally applicable to proceedings on a forthcoming bond for rent. But a technical set off, to be available at law, must be *liquidated*, and in the nature of a debt. See *Bunting* v. *Cochran*, 99 Va. 558, 7 Va. Law Register 327, and editorial note, where recoupment and set-off are contrasted. The set-off in *Allen* v. *Hart*, upon which the ruling in the principal case is based, was liquidated. It does not clearly appear that the tenant's claim proposed to be set up in the principal case, *was* entirely liquidated. True, there was a $250 judgment in favor of the tenant, but the latter seems to have asserted unliquidated claims besides. But whatever claims were asserted on the part of the tenant, they all arose out of the breach of contract of lease, and hence were in the nature of *recoupment* and not *set-off*. If this is true—if part of the tenant's claim was unliquidated—then the terminology of the court becomes important. The court would probably not go to the extent of holding that an unliquidated "set-off" might be asserted by a tenant in a proceeding of this kind, and yet the language used could bear that construction. In order to get at the doctrine of a case we are to look to the actual *decision*, on the precise facts, rather than to the language used by the court. Applying this test, we should say that the case is authority for the proposition that in a motion on a forthcoming bond, the tenant may, *by way of recoupment*, set up damages for breach of the contract of lease, whether liquidated or unliquidated.

HARDAWAY V. JONES.*

Supreme Court of Appeals : At Wytheville.

June 26, 1902.

1. CHATTEL MORTGAGE—*Description of property.* A deed of trust or mortgage conveying chattels, when recorded, is constructive notice to third persons, if the description in the deed or mortgage is such as will enable them to identify the property, aided by the inquiries which the deed or mortgage itself indicates and directs. But a deed of trust on "four mules," which does not give their color, sex, size, age, from whom purchased, nor state where or in whose possession they are, nor mention the residence of the grantor, the trustee, or the beneficiary therein, does not give constructive notice under section 2463 of the Code to innocent third persons.

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* Reported by M. P. Burks, State Reporter.